MALAYSIAN REPORTS

GOVERNMENT OF MALAYSIA & ORS. v. JUMAT BIN MAHMUD & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) April 14, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 147 of 1976]

Tort — Negligence — Duty of care of a teacher in controlling pupils — Whether risks of injury forseeable — Question of causation — Whether teacher took reasonable steps to protect plaintiff against such risks.

Schools — Teacher and pupils — Duty of care of teacher in controlling pupils.

In this case the facts were that a pupil in school pricked the respondent's thigh with a pin which produced a shock causing the latter to turn round and his eye came in contact with the sharp end of a pencil which the pupil was holding. The eye had to be removed subsequently. The respondent and his father brought an action for damages and the learned trial judge in the High Court gave judgment for the respondents. He held that that there had not been sufficient or reasonable supervision by the form mistress at the material time and that the injury was caused by her negligence. The appellants appealed to the Federal Court.

Held, allowing the appeal: (1) in considering whether or not the appellants were in breach of their duty of care to the respondent it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably forseeable and secondly assuming it was, whether the appellants took reasonable steps to protect the respondent against those risks;

(2) in this case the evidence fell short of the requirement that the injury sustained by the plaintiff-respondent were of a kind or type of class reasonably forseeable as a result of the form mistress's wrongful act, assuming she was wrongful. It could not be said that the particular teacher exposed the plaintiff-respondent to injury of a class or type that could reasonably be forseen;

(3) it could not be concluded in this case as a matter of evidence and inference that more probably than not constant vigilance in the classroom would have prevented the injury which the plaintiff-respondent in fact received.

Cases referred to:-

(1) *Chen Soon Lee* v. *Chong Voon Pin & Ors.* [1966] 2 M.L.J. 264.
(2) *Ricketts* v. *Erith Borough Council* [1943] 2 All E.R. 629, 631.
(3) *Richards* v. *State of Victoria* [1969] V.R. 139, 141.
(4) *Bourhill v. Young* [1943] A.C. 92.
(5) *King* v. *Phillips* [1953] 1 Q.B. 429.
(6) *The Wagon Mound* [1961] A.C. 388.
(7) *Bradford* v. *Robinson Rentals* [1967] 1 All E.R. 267.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for appellants Nos. 1 & 2.

C. Abraham for appellant No. 3.

A.K.J. D'Cruz for the respondents.

Raja Azlan Shah F.J. (delivering the judgment of the Court): On March 1, 1977 we allowed this appeal and said that we would give our reasons at a later date. We now proceed to do so.

This appeal raises an important point, and it is the second occasion on which such a question relating to schools has come before our courts.

On the first occasion a party of students and teachers of Chung San School, Riam Road, Miri, Sarawak, went on a picnic to Tanjong Lobang, and the deceased (a school girl aged 11 years) while playing a ball game with her friends in waist deep water, suddenly moved into a depression and was drowned. Lee Hun Hoe J. (as he then was) in dismissing the case held as a second limb of his judgment that a schoolmaster's duty towards his pupil is the same as that of a careful father, *i.e.*, to take such care of his pupils as a careful father would take of his children (see *Chen Soon Lee* v. *Chong Voon Pin & Ors.*[1]).

The second occasion concerns this appeal. The facts are short and simple. The plaintiff aged 11 years old was a Standard V student of Sekolah Dato Klana Maamor, Jalan Range, Seremban. He was injured in his right eye when another pupil, Azmi bin Manan ("Azmi"), celebrated his teacher's momentary inattention in class by pricking the plaintiff's thigh with a pin which produced a shock causing the latter to turn round and his right eye came in contact with the sharp end of the pencil which Azmi was holding. The eye had to be removed subsequently. Azmi said it was an accident. The trial judge agreed that he did not deliberately stab the plaintiff's eye with a pencil. I think the evidence favours such an inference, otherwise the serious injury sustained by the plaintiff would have been immediately noticed. It is in evidence that Azmi was a playful boy and had on previous occasions poked the plaintiff and other boys with a pin or pencil but never in their eyes, and that was done without the knowledge of the form teacher or Mrs. Kenny in whose class the accident occurred. It also never occurred to any pupil to complain of Azmi's abnormal propensity.

It is common ground that at the time of the accident Mrs. Kenny had given written work to the class consisting of 40 pupils and it was during the period when she was doing her work at the table that Azmi wandered about pricking a boy sitting next to the plaintiff and also the plaintiff. It was argued before the trial judge that there was lack of supervision in Mrs. Kenny's class thus resulting in the accident which caused the injury to the plaintiff. That, it was contended, constituted breach of duty which the appellants owed the plaintiff. If Mrs. Kenny had paid particular attention to Azmi's behaviour, or misbehaviour, the accident would not have happened and therefore the plaintiff would not have sustained the serious injury.

The learned trial judge gave judgment for the plaintiff. After addressing his mind to paragraphs 297, 299 and 301 in *Charlesworth on Negligence*, 5th ed., he held as follows:

"I am satisfied that there has not been sufficient or reasonable supervision of the class by Mrs. Kenny at the material time and that the injury inflicted by Azmi bin Manan on the infant plaintiff was caused by her negligence. It is established that Azmi bin Manan was a playful and mischievous boy who used to go round and disturb other boys especially those sitting at the back and had either Mrs. Kenny or the form teacher bothered to find out she would at least have discovered that Azmi bin Manan had been carrying a pencil with him when he wandered about in the class-room and therefore ought to have warned him and the class as a whole not to play with sharp pencils. As it was, such a warning was given only after the incident. Mrs. Kenny was not attending to any particular pupil and if she had paid proper attention to what

was going on at the back of the class she certainly would have noticed that Azmi bin Manan was missing from his desk and found out what he was up to. Mrs. Kenny knew that Azmi bin Manan was playful and as she ought to have known also of his propensity to play with sharp pencils it was her duty to take precautions to prevent him from causing any possible injury to other pupils in the class which she had not taken."

Before us it was agreed that this was not a case of breach of the obligation of the school teacher to maintain that degree of discipline which would enable her effectively to perform her function as a teacher, but one of lack of supervision on her part in that she had failed to check or prevent a recalcitrant pupil from wandering about in the classroom. Therefore the issue here is whether there was evidence on which the court could conclude that the injury to the plaintiff was causally related to any negligence on the part of the appellants. Counsel on behalf of the appellants submitted that there was none. The trial judge held there was. The question arises how much supervision is required of a school teacher in a classroom in order to protect the pupils from molestation and other risks of injury whatever their source.

It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children (see *Ricketts* v. *Erith Borough Council*).[2] It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards* v. *State of Victoria*[3] when he said:

"The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex hypothesi (the teacher) should reasonably have foreseen."

In that case the plaintiff suffered brain damage as a result of a fist fight which occurred at a High School in a classroom and in the presence of a teacher. Evidence suggested that the particular teacher had had some difficulties in maintaining discipline in the past and that, on the day in question, the blow which caused serious injuries to the plaintiff had been preceded by an argument, a scuffle, and then a fight.

The law does not attach strict liability on a school teacher for the torts of his/her pupil, but only on proof that he/she had failed to exercise reasonable care in controlling the pupil such as would have avoided the injury to the plaintiff. Since that is a matter of evidence and inference, great care needs to be taken to see that the breach of the duty of care must be causally related to the injury received. Thus Lord Porter in *Bourhill* v. *Young*,[4] Denning L.J. (as he then was) in *King* v. *Phillips*,[5] and the Privy Council in *The Wagon Mound*[6] have expressed the view that the test of liability for shock is foreseeability of injury by shock. In *The Wagon Mound, supra,* it was held that if the damage which materialised was damage by fire, then for the defendant to be liable he must have been able to anticipate damage by fire; that he could anticipate damage by fouling the wharf's slipways was held not to be enough. Since that case the principle that the damage sustained must not only be caused by the wrongful act, but must be damage of a class or character reasonably foreseeable as a possible result of that act is now firmly established. There must be testimony from which it is a logical and reasonable inference, and not mere speculation or conjecture, that the school teacher's act contributed to the injury. And, of course, in deciding this matter, it is relevant to take into account common experience in a big school classroom consisting of 40 pupils. Therefore for a plaintiff to succeed in a case such as the present he must adduce direct or circumstantial evidence which tends to show not only how the accident happened but also that the injury was the result of some conduct on the part of the defendant. Whether the evidence permits a logical and reasonable inference that the defendant's conduct had some effect in producing the injury is a question of law which this court can decide. *Bradford* v. *Robinson Rentals, Ltd.*[7] illustrates the working of these principles. In that case the defendant employers carelessly exposed the plaintiff van driver to extreme cold in the course of his duties. In consequence he suffered frost-bite. The court held that the defendants exposed him to severe cold and fatigue likely to cause a common cold, pneumonia or chilblains, and that frost-bite was of the same type and kind as the harms foreseeable, so that the defendants were held liable.

In the present case, in considering whether or not the appellants were in breach of their duty of care to the plaintiff it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly, assuming it was, whether the appellants took reasonable steps to protect the plaintiff against those risks. It is unfortunate that the trial judge did not clearly indicate in his judgment that these two questions were separate and should be dealt with by him separately.

In my judgment, only the first question needs to be considered. There is evidence that the class never lacked supervision. The form teacher and Mrs. Kenny knew of Azmi's propensity to leave the desk and wander about and when they noticed it they immediately asked him to return to his desk which he did. But there was no evidence that they knew that Azmi was a bully because no pupil had ever complained to either of them. The trial judge held that Mrs. Kenny was negligent in failing to give proper attention to the class all the time, and that if she had paid proper attention to what was going on at the back of the class she certainly would have noticed that Azmi was missing from his desk and found out what he was doing and thus would have prevented the injury to the plaintiff. The question here is whether there was evidence from which a logical and reasonable inference could be drawn that as a result of the teacher's momentary inattention the injury to the plaintiff was reasonably foreseeable. In other

words, according to the trial judge, there was evidence on which he could conclude that the injury to the plaintiff was causally connected with her wrongful act of momentary inattention. With due respect to the trial judge the evidence falls short of the requirement that the injury sustained by the plaintiff was of a kind or type of class reasonably foreseeable as a result of Mrs. Kenny's wrongful act, assuming she was wrongful.

The sole question in the present case is a question of causation. In my judgment it cannot be said that the particular teacher carelessly exposed the plaintiff to injury of the class or type that could reasonably have been foreseen. If the injury which resulted was injury by the sharp end of a pencil, then for the appellants to be liable they must have foreseen injury by the sharp end of a pencil. A pencil is not a dangerous article. All pupils use pencil in classrooms. Indeed the trial judge accepted appellants' contention that to say that there was a duty by them to instruct each and every pupil on the proper use of a pencil was to stretch things to a ridiculous extent. Again, assuming the injury to the plaintiff's eye was in fact caused by a wrongful act of the teacher — for not being attentive in class all the time — it cannot be said that it was reasonably foreseeable that the injury of this class or character was a reasonably foreseeable result of such a wrongful act. In my opinion, I cannot conclude as a matter of evidence and inference that more probably than not constant vigilance in the classroom would have prevented the injury which the plaintiff in fact received. There is no factual basis of the causal connexion between the step the trial judge was entitled to think the teacher ought, in the performance of her duty of care, to have taken, and the injury of which the plaintiff sustained. Because notwithstanding the proper exercise of supervision a recalcitrant pupil may act to the injury of a fellow pupil, it is prudent to see that the necessary causal relationship is made out. The effect of constant vigilance in class as a method of preventing a recalcitrant pupil from wandering about is often such a debatable matter that the causal relation between the lack of supervision and the injury caused to a fellow pupil may not be a matter of evidential probability but be no more than a matter of mere speculation.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; A.K.J. D'Cruz & Co.*

OOI JIM & ANOR. v. AI EIT & ORS.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.J.J.) May 11, 1977]

[Alor Star — Federal Court Civil Appeal No. 114 of 1974]

Practice and Procedure — Action for declaration — Locus standi — Whether widow can claim declaration of status of her husband — Whether necessary to take out letters of administration.

The first appellant had applied for a declaration that her husband was the lawful adopted son of one Tan Ing who had died intestate. The application was dismissed as it was held that she should first obtain letters of administration of her husband's estate. On appeal to the Federal Court.

Held, allowing the appeal: it was not necessary for the first appellant to take out letters of administration to bring the action which was primarily an action for a declaration as to the status of her husband. The question of taking out letters of administration would only arise when it became necessary for her to claim her share in the estate of the intestate.

FEDERAL COURT.

A. Jayadeva for the appellant.

Triptipal Singh for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the first plaintiff in the action from a judgment of Syed Agil Barakbah J. dismissing her claim for a declaration that her deceased husband Tan Swee Teik was the lawful adopted son of Tan Ing @ Tan Eng @ Tan Teng Eng who died intestate in 1929 and that she as the lawful widow of the said Tan Swee Teik deceased was a beneficiary of the estate of the said intestate.

The main defence to the action by the respondents as defendants was that the first plaintiff had not taken out letters of administration to the estate of her deceased husband, and therefore could not commence an action to ask for the declaration sought. This point indeed was raised as a preliminary issue by counsel for the defendants. It was contended that the first plaintiff had no *locus standi*. The learned judge agreed with the point taken by counsel for the defendants and ruled that it was necessary for the first plaintiff to take out letters of administration of her husband's estate in order to proceed with her claim.

In our judgment it was not necessary for the first plaintiff to take out such letters of administration in order to bring this action which was primarily an action for a declaration as to the status of her husband. Declaratory proceedings are often the most convenient and sometimes the only possible mode of determining status. The question of taking out letters of administration would only arise when it became necessary for the first plaintiff to claim her share in the estate of the said intestate. We therefore allowed the appeal and remitted the case for trial in the High Court.

Appeal allowed.

Solicitors: *Oo Gin Sun, Bakar & Co.; Triptipal Singh & Co.*